Supreme Court, U.S.
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Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

HAMID CHAMALALI, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

- Whether the prosecution and conviction of Petitioner under subsection (1) of D.C. Code Section 22-1121 for the offense of "disorderly conduct" where the record reflects that Petitioner would not have been arrested had he not verbally challenged the arresting officer's order to leave the scene and where the arresting officer testified that Petitioner was arrested because he "didn't quiet up" violated Petitioner's rights under the First Amendment to the United States Constitution.

- Whether D.C. Code Section 22-1121(1) as construed by the District of Columbia Court of Appeals is unconstitutional.

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Reference to Decisions Below

Petitioner was convicted after a bench trial before Senior Judge Nicholas S. Nunzio of the Superior Court of the District of Columbia on April 4, 1994. Judge Nunzio rendered his judgment of conviction orally.

Petitioner's conviction was affirmed by the District of Columbia Court of Appeals in a written decision entered March 20, 1995, *Chemalali v. District of Columbia*, __ A. 2d __(Case No. 94-CO-504)

(Attached in Appendix hereto).

Jurisdictional Statement

The judgment in the decision to be reviewed was entered on March 20, 1995.

Jurisdiction to review the judgment below on certiorari is conferred on this Court by 28 U.S.C. §1257.

Constitutional and Statutory Provisions Involved in This Case

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

D.C. Code, S22-1121(1)(1989):

> Whoever with the intent to provoke a breach of the peace, or under such circumstances that a breach of the peace may be occasioned thereby: (1) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; . . . shall be fined not more than $250 or imprisoned not more than 90 days, or both.

Statement of the Case

This case arises out of the arrest and conviction of Petitioner Hamid Chemalali ("Chemalali") for allegedly violating subsection (1) of Section 22-1121 of the Code of the District of Columbia which makes it a crime for anyone

> with the intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby [to] . . . [a]ct[] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.

The Information sheet by which Chemalali was formally charged with violating D.C. Code §22-1121(1) specified that his "disorderly conduct" had consisted of "acting loud and boisterous, kicking at citizens."

The charges against Chemalali were filed by Officer Harold Cunningham of the Metropolitan Police Department ("MPD") of the District of Columbia. Immediately following Chemalali's arrest, Cunningham completed a Prosecution Report (DC MPD

Form PD-163) with respect to the arrest. The Prosecution Report, which was received in evidence at Chemalali's trial, contained the following Statement of Facts regarding the offense for which Chemalali had been arrested:

> On 11-17-93 at approximately 005 I [illegible] was flagged down by W-1 and W-1 stated that there were 2 white males yelling, screaming and starting to fight with people walking by. On the sidewalk W-1 then pointed out D-1 and CD-1, D-1 and CD-1 were observed yelling at people and kicking at 3 different citizens. D-1 and CD-1 were advised to catch a cab and go home by [Cunningham]. D-1 and CD-1 stated hell no and started to pick a fight with W-1 by yelling fuck you citizen, I'll get you for this. D-1 and Co D-1 were then advised to quiet down and move on and D-1 and Co D-1 started to block the sidewalk and poke his finger at other citizens. D-1 refused to move on again. D-1 was arrested and transported to 2D for processing and advised of his rights. D-1 laughed and stated you have no witnesses, I'll beat this.

Chemalali was tried on the charges specified in the Information in a bench trial before D. C. Superior Court Senior Judge Nicholas S. Nunzio on April 4, 1994. At the trial, Cunningham testified that

his attention was first drawn to Chemalali and his companion by the person identified in the Prosecution Report as W-1 and that he observed them "walking behind like four people and they were kicking and hitting towards them." Cunningham also testified that the "kicking and hitting" that he observed did not make contact with anyone and that he did not observe Chemalali or his companion impede or interfere with anyone. It is clear from the Statement of Facts in the Prosecution Report and from Cunningham's testimony at trial that the conduct for which Chemalali was arrested was not the "kicking at citizens" that Cunningham initially observed. The Prosecution Report states that, upon observing Chemalali and his companion "kicking at citizens," Cunningham advised them to "catch a cab and go home," and it further reflects that, although Chemalali responded to this advice by stating "hell no" and directing abusive language at the

complaining citizen, Cunningham did not arrest him at this point, but rather ordered him to "quiet down and move on." It was only after Chemalali persisted in questioning Cunningham's authority to order him to leave the area that Cunningham placed him under arrest.

At the trial, Cunningham amplified on the circumstances that resulted in Chemalali's arrest. He testified that when he first approached Chemalali and his companion he "advised them that they would either have to calm down and -- or they would end being arrested for disorderly."[1] According to Cunningham, the first words that Chemalali addressed to him were: "Fuck you. I know my rights. I can walk -- this is a public street." Cunningham further testified that Chemalali and his companion continued to tell him that "they knew their rights and I had no right

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[1]All quotations in this Statement of Facts are direct quotations from the transcript of the trial.

speaking to them" and that Chemalali "stated that he knew his rights and wanted to know why I was stopping him." Cunningham testified that he responded to Chemalali's question as to why he was being stopped by telling him that "a citizen had . . . a problem with him and would like to have it rectified," and that he told Chemalali "to calm down, leave the citizen alone, and just walk down the street. . . ."

The following questions and answers as Chemalali's attorney pressed Cunningham to be more specific about what aspect of Chemalali's conduct led to his arrest leaves no doubt that Chemalali was arrested solely because he persisted in arguing with Cunningham:

> Q. The disorderly conduct that you arrested him for, it was essentially their continuing to argue over this incident with you, is that not correct?
>
> A. Argue and draw people out of bars as well as the profanities and all the other stuff that I had mentioned.

Q. All directed at you?

A. No. He directed it to several different people.

Q. Well, the other citizen is across the street and they're having an engagement with you. Is it not true that your reason for finally arresting him is that they are having this verbal engagement with you and not basically doing what you told them to do which was get off the street and get home?

A. No. I asked them to quiet up and move on. They had not -- several times and did not do that.

Q. It is because they didn't do that that you finally arrested them, correct?

A. Because they didn't quiet it. They didn't, they didn't quiet up. They continued on, continued yelling profanities, continued yelling at a loud voice - -

Q. At whom?

A. And continued drawing people out.

Q. At whom?

A. Myself and the person across the street.

Chemalali's attorney pressed Cunningham further on the point by asking

Is it not true that your reason for finally arresting him is that they [Chemalali and his companion] are having this verbal engagement with

> you and not basically doing what you told them to do which was get off the street and get home?

Cunningham responded:

> No. I asked them to quiet up and move on. They had not -- several times and did not do that.

It is also clear from Cunningham's testimony that the yelling and profanity that he cited as the reason for Chemalali's arrest was not gratuitous, but was provoked by Cunningham interceding on behalf of W-1 in an argument that Chemalali and his companion apparently had with W-1 *before* Cunningham arrived on the scene. The argument had ended and Chemalali and his companion were proceeding away from the scene. Cunningham called Chemalali over and told him that he "had stopped him because of a problem that he had had with another citizen," a problem that Cunningham had not observed. The other citizen was standing at Cunningham's side, having disobeyed Cunningham's order that he

remain on the other side of the street while Cunningham dealt with the situation. Cunningham realized that there was tension between Chemalali and W-1. In fact, the tension was so great that, in Cunningham's words, he "needed to call for assistance. There was too much going on for me." Thus, according to Cunningham, he did not arrest Chemalali because of the abusive language that Chemalali directed at him and W-1; rather, he arrested Chemalali because a crowd had been attracted by the argument between Chemalali, Cunningham and W-1 and Cunningham was concerned that a fight would break out.[2] Arresting

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[2]The Assistant DC Corporation Counsel prosecuting the case asked Cunningham whether he had "concern with respect to the individuals who were coming out of the bars at that particular time?" Cunningham responded:

> Yes. If I -- it's my experience that whenever you get a large crowd starting to form, you have little fights start off within the crowd itself because someone might bump up into somebody else, and they don't like it, and then you have a fight.

This question and answer reflects that law enforcement officials in the District of Columbia believe that the mere presence of onlookers to an argument between a police officer and a member of

Chemalali was Cunningham's method of crowd control.

After the conclusion of the District of Columbia's case against Chemalali, Chemalali's attorney moved to have the charges against Chemalali dismissed on the grounds that "under *Houston* against *Hill* . . . it is absolutely clear that arguing with a police officer, even using profanity to a police officer, is not a crime." The trial judge denied the motion to dismiss the charges. After the presentation of Chemalali's defense, Chemalali's counsel repeated the argument that the verbal conduct that Cunningham cited as the basis for charging Chemalali with disorderly conduct "cannot create a crime under *Houston* against *Hill*." The trial judge rejected this argument and

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the public provides sufficient justification for an arrest for disorderly conduct. This belief, though at odds with the holding of this Court in *Houston v. Hill*, 482 U.S. 451 (1987), is based on the holding of the District of Columbia Court of Appeals in *Gueory v. District of Columbia*, 408 A.2d 907 (D.C.C.A. 1979), which was reaffirmed by the decision in this case.

found Chemalali guilty.

Chemalali took an appeal from his conviction to the Court of Appeals for the District of Columbia. In that appeal, Chemalali argued, *inter alia*, that since the "conduct" which led to his arrest and conviction was entirely verbal in nature, his conviction violated the First Amendment and, thus, should be set aside. In rejecting this argument and upholding Chemalali's conviction, the Court of Appeals held that there was sufficient evidence that Chemalali's "yelling and screaming 'annoyed disturbed, interfered with or was otherwise offensive to' [persons] other than the police officer" to sustain his conviction for disorderly conduct. Appendix A at 6. The Court of Appeals summarized the evidence that justified Chemalali's conviction as follows:

> . . . [A]ppellant shouted profanities at the officer, the complaining citizen on the scene, and other people on the street. His words and

> actions attracted a crowd and caused a bouncer whom the officer knew to start to come to his aid. Moreover, Appellant's conduct was not merely loud and boisterous, nor was it designed to express ideas. It consisted primarily of profanities and provocative language. The officer testified that the appellant and his companion yelled profanities and became abusive towards him "and the citizen there" and that appellant poked his finger toward the citizens, saying, at one point, "You see what's going on. This is LA all over again." Such comments and actions are the type which seemed to invite some action from the crowd.

Appendix at 7. Although Chemalali had relied extensively in his appeal on this Court's holdings in *Houston v. Hill*, 482 U.S. 451 (1987) and *Terminiello v. Chicago*, 337 U.S. 1 (1949), the court below made no effort to reconcile its decision with the holdings in these cases.

ARGUMENT

I. The Arrest and Conviction of Chemalali Was In Violation of His First Amendment Rights.

Although Cunningham initially stopped Chemalali because he had observed him walking down the street "kicking at

citizens," it is clear that Cunningham did not call him over with the intention to place him under arrest for this conduct and that this conduct was not the reason that Chemalali was arrested. When Cunningham called Chemalali over, he told him to calm down and to leave the area. According to the arrest report and Cunningham's testimony, he repeated these orders several times, and it was only after Chemalali verbally challenged Cunningham's authority to give these orders that Chemalali was placed under arrest. Based on the record, there can be no doubt that had Chemalali obeyed Cunningham and calmly walked away from the scene after having been observed "kicking at citizens," and after having argued loudly with Cunningham and even said "fuck you" to him, Chemalali would not have been arrested.

From the time that Chemalali was called over by Cunningham and told to calm

down and leave the scene, to the moment of his arrest, the only "conduct" that Chemalali engaged in was arguing with Cunningham and with the "citizen" who had complained to Cunningham about Chemalali and his companion and who was continuing to press his complaint. Thus, it indisputable that the "conduct" for which Chemalali was arrested and convicted consisted solely of speech that he addressed primarily at Cunningham and which challenged Cunningham's right to stop Chemalali and to order him to leave the area. Chemalali's speech was loud, angry, disrespectful, and vulgar; nevertheless, it was speech and nothing more.

In *Houston v. Hill*, 482 U.S. 451 (1987), this Court struck down a municipal ordinance of the City of Houston which made it unlawful for a person to interrupt a police officer in the performance of his duties on the grounds that the ordinance,

as construed and applied by the City of Houston, was overbroad in that it made it a crime verbally to interrupt or interfere with a police officer. In striking down the ordinance, the Court observed that

> [t]he freedom of individuals verbally to oppose or challenge police action without risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Id. at 462 - 463. Following *Houston v. Hill*, the Ninth Circuit in *Duran v. City of Douglas Arizona*, 904 F. 2d 1372 (9th Cir. 1990) affirmed the entry of summary judgment against a police officer for having unlawfully arrested the appellant, Duran, for "disorderly conduct" where the arrest in question had been based on the facts that Duran, while drunk and riding in a car, had made obscene gestures towards and had yelled profanities at the arresting officer. In holding that Duran's arrest was unlawful, the Ninth Circuit observed, citing *Houston v. Hill*, that

> We cannot, of course, condone Duran's

> conduct; it was boorish, crass and, initially, at least, unjustified. Our hard working law enforcement officers surely deserve better treatment from members of the public. But disagreeable as Duran's behavior may have been, it was not illegal; criticism of the police is not a crime.

904 F.2d at 1377.

The holding of this Court in *Houston v. Hill*, *supra*, and the application of that holding in *Duran v. City of Douglas Arizona*, *supra*, are directly applicable to, and dispositive of this case. It is clear that the offense for which Chemalali was arrested and ultimately convicted consisted of questioning, challenging and criticizing Cunningham's actions. According to Cunningham, the first words that Chemalali addressed to him were "[f]uck you. I know my rights. I can walk -- this is a public street." Moreover, according to Cunningham, Chemalali and his companion continued to tell him that "they knew their rights and [that Cunningham] had no right to even be speaking to them"

and Chemalali "stated that he knew his rights and wanted to know why I was stopping him." Cunningham's response was to tell Chemalali that a citizen had had a problem with him that the citizen wanted to have rectified and, by way of "rectifying" the problem, Cunningham ordered Chemalali "to calm down, leave the citizen alone and just walk down the street." The exchange between Chemalali and Cunningham continued along these lines, with Cunningham ordering Chemalali to calm down, move on and quiet down, and Chemalali disputing Cunningham's right to give such orders.

Chemalali was correct in his understanding of District of Columbia law that Cunningham had no lawful authority in the circumstances to order him to "move on" or to leave the area.[3] Had Cunningham

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[3]Under the laws of the District of Columbia, police officers do not have the authority to order persons on a public street to "move on" unless the persons are part of a crowd of "three or more" that is completely and continuously blocking a sidewalk or traffic lane. District of Columbia Metropolitan

conceded this fact and withdrawn from the argument, the incident would have ended without an arrest. But Cunningham persisted in asserting his authority, provoking Chemalali to persist in questioning and challenging that authority. Chemalali ultimately was arrested for "disorderly conduct" as Cunningham's means of asserting his authority and putting an end to the argument. In these circumstances, there can be no doubt that Chemalali was arrested for arguing with Cunningham and challenging his authority. As such, Chemalali's arrest and conviction violated his First Amendment rights. *Houston v. Hill, supra; Gooding v. Wilson,* 405 U.S. 518 (1972); *Duran v. City of Douglas Arizona, supra.*

The fact that Cunningham testified that Chemalali's conduct caused a crowd to form, and that he was concerned that

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Police Department, TRAINING BULLETIN, "Enforcement of Disorderly Conduct Statutes (June, 1992) at 3.

fights might break out in the crowd does not provide a justification for what was otherwise an unconstitutional arrest. It is not claimed that Chemalali exhorted the crowd to take any action, or that Chemalali directed his speech towards the crowd other than to call upon passersby to bear witness to what was transpiring between himself and Cunningham. Lawful speech does not lose its First Amendment protection and become criminal speech based on the presence, or even the reaction, of a crowd. *Terminiello v. Chicago*, 337 U.S. 1 (1948).[4]

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[4] In upholding Chemalali's conviction, the court below ignored Chemalali's reliance on *Terminiello* and relied instead upon its own holding in *Rodgers v. United States*, 290 A. 2d 395 (D.C.C.A. 1972), a case which the court below characterized as involving facts that differed in degree, but not substance, from the case at hand. Appendix at 7 - 8. *Rogers* involved physical destruction of property and conduct which the court held amounted to incitement to riot, conduct that was clearly different in kind, as well as degree, from the verbal conduct for which Chemalali was arrested. The inability of the court below to discern the constitutionally significant differences between the "conduct" involved in the *Rogers* case and the "conduct" involved in this case reflects an insensitivity of the District of Columbia to basic First Amendment principles that can only be rectified by this Court granting this Petition.

II. As Construed by the District of Columbia Court of Appeals, Section 22-1121(1) of the District of Columbia Code Is Unconstitutional.

As discussed above, although Cunningham claims that he initially called Chemalali over because he had observed him "kicking at citizens," it is clear from the record that Cunningham had no intention when he called Chemalali over of arresting him for this conduct, and that he only decided to place Chemalali under arrest because Chemalali challenged his authority and argued with him. The court below clearly recognized that this is what occurred as it specifically points out in its summary of the relevant facts that Chemalali was not placed under arrest for the non verbal conduct that Cunningham had observed, "kicking at citizens," but was told by Cunningham to "calm down" and "leave the area," and that it was only after Chemalali and his companion became, "louder, more excited," and verbally

"abusive towards" Cunningham, and Cunningham became "concerned about the crowd forming," that Chemalali was placed under arrest. Appendix at 2 - 3.

In explaining its reasoning for sustaining Chemalali's conviction, the court below left no doubt that, in its opinion, the verbal conduct that Chemalali engaged in, of and by itself, was sufficient to justify an arrest and conviction under Section 22-1121 (1) of the District of Columbia Code. The court held that Chemalali's "yelling and screaming" which "attracted a crowd" and "consisted . . . of profanities and provocative language," was not protected by the First Amendment. Appendix at 6 - 7.[5]

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[5]In holding that Chemalali's conduct was not protected by the First Amendment, the court below stated that the conduct for which Chemalali was arrested consisted of "kicking, poking and shouting profanities at citizens." This is factually incorrect. As noted above, Chemalali was not arrested for "kicking at citizens," rather he was told to "calm down" and "leave the area" after this conduct was observed by Cunningham. The record reflects, and it is clear from the court's decision, that the only "poking at citizens" that

According to the court,

> words and actions likely to produce violence on the part of others are included within the purview of breach of the peace. . . . If an individual engages in actions in a manner to disturb, annoy, or be offensive to others under circumstances where a breach of the peace might be occasioned thereby, that individual may be convicted under §22-1121(1).

There is no dispute that *non verbal actions* that disturb or annoy others to the point that they are "likely to produce violence" constituted a legitimate grounds for charging a person with "disorderly conduct" under D.C. Code §22-1121(1). However, the problem with the construction given to the ordinance by the court below is that the court holds that "words" as well as "actions" that are "likely to produce violence" may be punished as a

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Chemalali did was to gesture with his finger to get the attention of passersby while he called to them to observe "what's going on." Appendix at 7. With the exception of calling out to passersby to observe what was taking place, there is no evidence that he directed any words, let alone "profanities," at anyone other than Cunningham and the complaining citizen who was directly engaged in the argument that had been initiated when Cunningham, acting at the behest of this citizen, ordered Chemalali to "leave the area."

crime. Moreover, not only does the court not limit the words that may be punished to "narrowly limited classes of speech" that are not protected by the First Amendment, but the court's decision cites as aspects of Chemalali's speech that are not "safeguarded by the First Amendment," the fact that he used "profanities and provocative language," was verbally "abusive," and stated: "You see what's going on. This is LA all over again." Appendix at 7. The court below does not claim that the speech that it found punishable amounted to "fighting words," and, as the speech was directed primarily at a police officer, it is doubtful that the words could properly have been found to have reached the level of "fighting words."[6] Nevertheless, the court below

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[6]In *Matter of M.W.G.*, 427 A.2d 440 (1981), the District of Columbia Court of Appeals held that offensive language directed at two police officers did not constitute a breach of the peace because:

> Police officers are trained to deal with unruly and uncooperative members of the public. An officer is expected to have a

held that Chemalali's speech was punishable because it was "of the type which seemed to invite some action or reaction from the crowd." Appendix at 7.

As authority for its holding that verbal conduct of the sort that Chemalali engaged is punishable as a crime, the court below relied upon its decision in *Rogers v. United States*, 290 A.2d 395 (D.C.C.A. 1972) and *Gueory v. District of Columbia*, 408 A.2d 907 (D.C.C.A. 1979). *Rogers*, which the court below characterized as involving a factual situation that differed only in degree, but not in legal substance, from the instant case, involved physical destruction of property and conduct which the court found amounted to incitement to riot. In relying on *Rogers*, the court

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> greater tolerance for verbal assaults, [citation omitted]; and because the police are especially trained to resist provocation, we expect them to remain peaceful in the face of verbal abuse that might provoke or offend the ordinary citizen.

427 A.2d at 443.

below ignored Chemalali's citations of the more apposite precedents, *Terminiello v. Chicago, supra,* and its own decision in *Allen v. District of Columbia,* 187 A.2d 888 (D.C.C.A. 1963), cases which establish that the presence or reaction of a crowd does not provide a valid justification for punishing offensive or provocative speech unless the speech amounts to incitement to riot. *In Gueory,* the District of Columbia Court of Appeals had upheld a conviction for disorderly conduct under D.C. Code §22-1121(1) for "openly flouting an officer's request" during a traffic stop "with inflammatory language and violent motions" such that "[p]assersby were attracted by the commotion." In response to Chemalali's contention that *Gueory* no longer is good law in light of the holding of this Court in *Houston v. Hill, supra,* the court below held that this issue need not be decided "because . . . *Gueory* can be read

properly to sanction conviction solely for the use of profane language in a public place," making its facts distinguishable from the instant case.

The decision below constitutes an authoritative construction of D.C. Code §22-1121(1) as making it a crime to engage in provocative and offensive speech not amounting to "fighting words" in the presence of a crowd if that speech is "of the type" that would seem "to invite some action or reaction from the crowd." The decision below further holds broadly that "[e]pithets and words of personal abuse are not in any real sense a communication of information safeguarded by the First Amendment." Appendix at 8. This holding is directly at odds with this Court's teaching in *Cohen v. California*, 403 U.S. 15 (1971). The authoritative construction of D. C. Code §22-1121(1) set out in the decision below clearly fails to define the sort of verbal conduct that constitutes a

punishable breach of the peace in with the narrow specificity required by decisions of this Court to separate legitimate from illegitimate speech. *Gooding v. Wilson,* 405 U.S. 518 (1972). In fact, as "construed by the [District of Columbia Court of Appeals], especially in the instant case, the District of Columbia provision as to breach of the peace is even broader than" the Georgia statute struck down as overbroad in *Gooding*. 405 U.S. at 527. Accordingly, as the ordinance in question "leaves wide open the standard of responsibility, so that it is easily susceptible to improper application," this Petition should be granted so that ordinance may be struck down thereby guaranteeing to residents of the District of Columbia the same First

Amendment freedoms as are guaranteed to the citizens of Georgia and other states.

Respectfully submitted,

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